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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 476

COWBOY PINK WILLIAMS, State Treasurer, State of Oklahoma; A. F. SHAW, State Auditor, State of Oklahoma; J. D. DUNN, LAWTON LEININGER and MIKE CONNERS, comprising the Oklahoma Tax Commission, State of Oklahoma; and HASKELL PUGH, MATHER M. EAKES and FRANK RENEAU, comprising the State Election Board, State of Oklahoma,

Appellants,

VERSUS

HARRY R. MOSS, ET AL.,

Appellees.

MOTION TO DISMISS

NORMAN E. REYNOLDS, JR.,
2808 First National Building,
Oklahoma City 2, Oklahoma,
Appellee;
DELMER L. STAGNER and
LEROY POWERS of
STAGNER, ALPERN & POWERS,
Liberty National Building,
Oklahoma City, Oklahoma,
Attorneys for Council of Democratic Neighborhood Clubs, Appellee.

Of Counsel:
G. D. SPRADLIN,
4921 North Lincoln,
Oklahoma City 5, Oklahoma,

October, 1963.

UTTERBACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. CE 9-8750

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Appellants,

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HARRY R. MOSS, ET AL.,
Appellees.

MOTION TO DISMISS

OBJECT

This Motion to Dismiss is directed to the appeal of the State Treasurer, State Auditor, Oklahoma Tax Commission and State Election Board of Oklahoma filed in their behalf by the Attorney General of Oklahoma. Their Jurisdictional Statement was filed on September 18, 1963.

The judgment appealed from by these state officials was not adverse to them and they are not aggrieved parties.

FACTS

This action was instituted in the United States District Court for the Western District of Oklahoma on January 31, 1961. No material action was taken pending the ruling in *Baker* v. *Carr*, decided March 26, 1962.

Thereafter a hearing on April 23, 1962, resulted in a 2-1 decision denying immediate injunctive relief which would have affected the then pending primary elections and the composition of the 1963 Legislature. The State Auditor, the State Treasurer, the Oklahoma Tax Commission and the State Election Board were all parties to this action at that time and have remained parties since.

The Appellants filed answers which are set forth in the appendix hereto.

In their answers both the State Election Board and the State Treasurer admitted the court had jurisdiction, that the Oklahoma Legislature is malapportioned in violation of the Constitution of the United States, that there is no rational basis to present apportionment statutes and that they result in invidious discrimination. The Treasurer prayed the court to reapportion and the State Election Board admitted the allegations of the complaint and prayed entry of "judgment and order as is just and equitable under the circumstances, which judgment and order these defendants shall abide."

The other two appellants, the State Auditor and State Tax Commission admitted the court's jurisdiction but merely denied the plaintiff was entitled to relief as against them since their pertinent functions "are purely ministerial, and are not affected by the fact the legislature of Oklahoma may not be" apportioned correctly.

Thereafter on June 12 further hearing was held and the court's ruling was reported at 207 F. Supp. 898.

Again on July 2nd, July 31st and August 1st, further hearings were held and the last is reported at 207 F. Supp. 898.

On July 30, 1962, three of these four appellants (all except the Election Board) pleaded for the relief granted when the State Treasurer through his counsel and the Acting Attorney General (who was attorney for the Tax Commission and State Auditor) filed a Joint Statement wherein they asked adoption of the plan of apportionment ultimately adopted by the court and said in part:

> "That they believe said formula is based upon a proper interpretation of such portions of the Oklahoma Constitution and statutes as are not in violation of the Constitution of the United States of America and that said formula provides fair and equitable representation, insofar as is reasonably practical, to all citizens of Oklahoma.
>
> "WHEREFORE they pray that said formula be adopted in any decree of Legislative reapportionment which this Court may make."

Prior to a hearing on January 15, 1963, the officials holding the offices of State Treasurer, State Auditor and Attorney General were replaced by their duly elected successors in office, the Treasurer and Auditor being unable to succeed themselves under the law and the Attorney General not having stood for re-election.

The new Attorney General stated at the beginning of the January 15, 1963 hearing, "please enter the appearance of Charles Nesbitt, Attorney General of Oklahoma, and Mr.

Fred Hansen, Assistant Attorney General, who is with me. Mr. Hansen has participated in the proceedings previously, and will continue to do so." Mr. Hansen had been the acting Attorney General prior thereto. Shortly thereafter but prior to the hearing of March 8, 1963, the members of the State Election Board were changed.

No amended pleadings were filed by any of these successors in offices. In open court it was represented that they would not change the record.

In response to a series of questions by Judge Murrah and Judge Rizley as to the position of the four Appellants at the start of the March 8, 1963 hearing, the record discloses the following answer of the Attorney General:

> "Mr. Nesbitt: They do not wish to take any action in (or) attempt to undo anything that's transpired in the earlier proceedings in the case."

The three-judge court entered its judgment on July 17, 1963. This Memorandum of Decision and Final Judgment sets forth the appearances and the substitution of parties Appellants' Appendix, p. i).

The court's order was directed against only the "Election Board of the State of Oklahoma, and all those acting by and under its authority." The Election Board of the State of Oklahoma was ordered to hold elections in accordance with a plan of apportionment proffered by the Attorney General of Oklahoma in a Proposed Order and Decree filed on July 30, 1962 (Appellant's Appendix, pp.xvi and xix).

In none of their pleadings do any of these Appellants raise any of the "Questions Presented by the Appeal" as stated on pages 7 and 8 of their Jurisdictional Statement.

Finally the three-judge court found the Oklahoma Constitution a proper, rational and therefore constitutional means of apportionment except for one clause.

The court found that a constitutional amendment approved by a large majority and proclaimed adopted by the Governor had established a *de facto* Legislative Apportionment Commission which had proceeded to apportion in almost the identical language subsequently adopted by the court. Unfortunately this amendment was declared to have failed of adoption by the State Supreme Court at the insistence of certain intervenors below or the Federal Court would never have had to issue its order herein (Appellant's Appendix, p. iv).

LEGAL REASONS FOR DISMISSAL

The legal question involved in this motion is whether a party may appeal from a judgment which he has urged the court to enter or which is in his favor.

The following cases sustain the proposition that a party may not appeal from a judgment or decree in his favor:

Lindheimer, et al. v. *Illinois Bell Telephone Co.*, 292 U.S. 151, 54 S.Ct. 658 (1934); *New York Telephone Co.* v. *Maltbie, et al.*, 291 U.S. 645, 54 S.Ct. 443 (1934); *Electrical Fillings Corporation, et al.* v. *Thomas & Betts Co., et al.*, 307 U.S. 241, 59 S.Ct. 860 (1939); and *Public Service Commission of Missouri, et al.* v. *Brashear Freight Lines, Inc., et al.*, 306 U.S. 204, 59 S.Ct. 480 (1939).

See also 69 A.L.R.2d 701 on: *Right of winning party to appeal from judgment granting him full relief sought.*

Where the relief prayed for by a party is granted he may not appeal from the judgment.

Mugford v. *Mayor and City Council*, Md., 44 A.2d 745, 162 A.L.R. 1101 (1946).

CONCLUSION

How could these four Appellants make clearer their desire that the court below apportion in exactly the manner it did! Having done so, how can they now be heard to complain to the Supreme Court of the United States?

As a matter of fact there is no judgment or order affecting in any manner the rights, either personal or official, of the State Treasurer, State Auditor or State Tax Commission.

The record is clear! The court below expressly enforced the Oklahoma Constitution with the exception of the removal of the seven limit clause on the number of representatives any County could have as being in derogation of the Fourteenth Amendment. The removal of the seven limit clause was advocated by the Attorney General for this reason. The court's order was in effect enforcement of the action of a *de facto* Legislative Apportionment Commission established by a majority of the voters and proclaimed by the Governor as proper. It was the interpretation of the Oklahoma Constitution made by the Oklahoma Attorney General. Thus it is based on ample state authority and action!

Let this fight be fought and financed by those who did not seek to lead the three-judge court to act in the very manner it has acted. The money collected from Oklahoma

taxpayers should not be expended to impede and defeat their right to constitutional representation.

There are two other timely Notices of Appeal pending. To deny this appeal is not necessarily to eliminate the ultimate right of this Court to review the decision in Oklahoma. It is to merely sustain the hallowed appellate precept that an issue cannot first be raised on appeal by appellants that is contrary to their urging on the court below. Denial of this appeal would eliminate further use of state finances and state officials in the fight to thwart the State Constitution. If there are proper parties to appeal, let them come forward with proper issues.

WHEREFORE, the undersigned appellees pray that the appeal filed in the name of the State Treasurer, State Auditor, State Election Board and State Tax Commission of Oklahoma, be dismissed.

Respectfully submitted,

NORMAN E. REYNOLDS, JR.,
2808 First National Building,
Oklahoma City 2, Oklahoma,
Appellee;

DELMER L. STAGNER and
LEROY POWERS of
STAGNER, ALPERN & POWERS,
Liberty National Building,
Oklahoma City, Oklahoma,
Attorneys for Council of Democratic Neighborhood Clubs, Appellee.

Of Counsel:
G. D. SPRADLIN,
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Oklahoma City 5, Oklahoma,

October, 1963.

APPENDIX

APPENDIX I.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

Harry R. Moss, Plaintiff,	)	
vs.	)	
William A. Burkhart, State Treasurer; Andy Anderson, State Auditor; and J. D. Dunn, Lawton Leininger and Mike Conners, composing the Oklahoma Tax Commission of the State of Oklahoma, Defendants.	)	No. 9130

ANSWER OF THE DEFENDANTS STATE AUDITOR AND MEMBERS OF THE OKLAHOMA TAX COMMISSION

Come now the defendants, Andy Anderson, State Auditor, and J. D. Dunn, Lawton Leininger and Mike Conners, composing the Oklahoma Tax Commission, and, with the permission of the court, withdraw the "Motion to Dismiss" filed thereby in the above cause in January 1961, and in lieu thereof, file the following answer.

In answer to plaintiff's complaint and pertinent amendments thereof, the above defendants, and each of them, allege and state:

1. Defendants admit that this court has jurisdiction in this action.

2. Defendants deny that plaintiff is entitled to the relief prayed for against them in his complaint and pertinent amendments thereof, and in this connection allege that defendants' functions and duties, insofar as this case

is concerned, are purely ministerial, and are not affected by the fact that the legislature of Oklahoma may not be, as alleged by plaintiff, apportioned in the manner prescribed by Sections 9 to 16, Article 5, of the Oklahoma Constitution.

MAC Q. WILLIAMSON
Attorney General of Oklahoma
FRED HANSEN
First Assistant Attorney General
ATTORNEYS FOR THE DEFENDANT
Andy Anderson, State Auditor

ALBERT D. LYNN
E. J. ARMSTRONG
ATTORNEYS FOR OKLAHOMA
TAX COMMISSION

June 2, 1962

APPENDIX II.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF OKLAHOMA

HARRY R. MOSS, Plaintiff, vs. WILLIAM A. BURKHART, STATE TREASURER; ANDY ANDERSON, STATE AUDITOR; J. D. DUNN, LAWTON LEININGER AND MIKE CONNERS, COMPOSING THE OKLAHOMA TAX COMMISSION OF THE STATE OF OKLAHOMA; CLEE FITZGERALD, CHAIRMAN, HERBERT F. HEWETT, VICE-CHAIRMAN, AND LOUIE R. GEISER, SECRETARY, MEMBERS OF THE STATE ELECTION BOARD OF THE STATE OF OKLAHOMA; J. HOWARD EDMONDSON, GOVERNOR OF THE STATE OF OKLAHOMA, Defendants, and H. A. PRICE, JOHN M. RASBERRY, J. B. HUTCHENS AND ROY GRIMES, DIRECTORS OF OKLAHOMANS FOR LOCAL GOVERNMENT, AN UNINCORPORATED ASSOCIATION, Intervenors.	No. 9130 Civil

ANSWER OF THE DEFENDANT, THE STATE ELECTION BOARD, CLEE FITZGERALD, CHAIRMAN, HERBERT F. HEWETT, VICE CHAIRMAN, LOUIE R. GEISER, SECRETARY

Come now the defendants, Clee Fitzgerald, Herbert F. Hewett and Louie R. Geiser, constituting the State Election Board of the State of Oklahoma, and for their Answer to the complaint herein state:

1. They admit the jurisdiction of the Court.

2. They admit the plaintiff is a proper party to bring this action.

3. They admit the allegations of the complaint.

4. They state that existing legislative apportionment laws in Oklahoma violate the Constitution of the State of Oklahoma and create invidiously discriminatory mal-apportionment in violation of the Fourteenth Amendment to the Constitution of the United States of America.

WHEREFORE having fully answered, these defendants pray that this Court enter such judgment and order as is just and equitable under the circumstances, which judgment and order these defendants shall abide.

s/ John E. Wagner
John E. Wagner

s/ Robert W. Blackstock
Robert W. Blackstock

ATTORNEYS FOR THE DEFENDANTS, THE STATE ELECTION BOARD OF THE STATE OF OKLAHOMA, CLEE FITZGERALD, CHAIRMAN, HERBERT F. HEWETT, VICE CHAIRMAN, LOUIE R. GEISER, SECRETARY

APPENDIX III.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF OKLAHOMA

HARRY R. MOSS, Plaintiff, vs. WILLIAM A. BURKHART, STATE TREASURER; ANDY ANDERSON, STATE AUDITOR; J. D. DUNN, LAWTON LEININGER AND MIKE CONNERS, COMPOSING THE OKLAHOMA TAX COMMISSION OF THE STATE OF OKLAHOMA; CLEE FITZGERALD, CHAIRMAN, HERBERT F. HEWETT, VICE-CHAIRMAN, AND LOUIE R. GEISER, SECRETARY, MEMBERS OF THE STATE ELECTION BOARD OF THE STATE OF OKLAHOMA; J. HOWARD EDMONDSON, GOVERNOR OF THE STATE OF OKLAHOMA, Defendants, and H. A. PRICE, JOHN M. RASBERRY, J. B. HUTCHENS AND ROY GRIMES, DIRECTORS OF OKLAHOMANS FOR LOCAL GOVERNMENT, AN UNINCORPORATED ASSOCIATION, Intervenors.	)	No. 9130 Civil

ANSWER

Comes now William A. Burkhart, State Treasurer for the State of Oklahoma, and for his answer to the Complaint, as supplemented, admits that this Court has jurisdiction in this cause, admits that the State Legislature of Oklahoma is mal-apportioned in violation of the Constitution of the United States; admits that the present apportionment of both houses of the Legislature has no rational basis and results in invidious discrimination between citi-

zens of Oklahoma; and concedes that this Court has the jurisdiction to enter appropriate orders to correct such invidious discrimination.

This defendant denies, however, that the mal-apportionment of the Legislature in any manner affects the validity of laws enacted and signed by the Governor, such Legislature being de facto and being the only legislative body empowered to carry on the affairs of state.

WHEREFORE, this defendant prays that the Complaint of the plaintiff be denied insofar as it seeks injunctive relief against this defendant, restraining him from paying valid state warrants, and further prays that the Court enter such appropriate orders as will effect a reapportionment of the Legislature in such a manner that it will not be in violation of the Fourteenth Amendment of the Constitution of the United States.

WILLIAM A. BURKHART, State Treasurer
of the State of Oklahoma

By s/ Delmer L. Stagner
STAGNER, ALPERN & POWERS